physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); see *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003).

Both before and after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the Hobbs Act has been uniformly construed to prohibit the illegal interference in any manner whatever with interstate commerce, even when the effect of such interference or attempted interference is slight. As the Second Circuit has explained:

> Our cases have long recognized that the jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. * * *
>
> * * * We now expressly hold that *Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. * * * [O]ur sister Circuits that have addressed this question have all so held.

United States v. *Farrish*, 122 F.3d 146, 148 (2d Cir. 1997) (brackets and internal quotation marks omitted), cert. denied, 522 U.S. 1118 (1998).

In keeping with that analysis, courts of appeals have consistently upheld Hobbs Act convictions where acts of extortion or robbery have depleted the assets of commercial enterprises that regularly purchase goods that have moved in interstate commerce. See, *e.g.*, *United States* v. *Haywood*, 363 F.3d 200, 209-211 (3d Cir. 2004) (robbery of a bar); *United States* v. *Capozzi*, 347 F.3d 327, 336-337 (1st Cir. 2003) (extortion of car dealership), cert. denied, 540 U.S. 1168 (2004); *United States* v. *Curtis*, 344 F.3d 1057, 1070-1071 (10th Cir. 2003) (robberies of stores and restaurants), cert. denied, 540 U.S. 1157 (2004); *United States* v. *Gray*, 260 F.3d 1267,

1272-1277 (11th Cir. 2001) (robbery of restaurant), cert. denied, 536 U.S. 963 (2002); *United States* v. *Arena*, 180 F.3d 380, 389-391 (2d Cir. 1999) (robbery of medical facilities), cert. denied, 531 U.S. 811 (2000); *United States* v. *Voung*, 171 F.3d 648, 654 (8th Cir. 1999) (robbery of jewelry stores); *United States* v. *Hebert*, 131 F.3d 514, 520, 523-524 (5th Cir. 1997) (robberies of bank, restaurant, and liquor stores), cert. denied, 523 U.S. 1101 (1998).

b. Petitioners do not contest the general validity of the "depletion of assets" theory (see Pet. App. 12) on which the court of appeals relied in sustaining their convictions. Rather, they argue that the evidence here was insufficient to establish that the requisite depletion of assets occurred. For at least three reasons, that claim does not warrant further review.

i. The court of appeals held that the jury could reasonably have found that "the out-of-state weed-eater, gas, paint, and tools were purchased on a customary basis by Leach exclusively for warehouse-related maintenance." Pet. App. 14. Combined with evidence that the loss of Daughtry's rental payments would deplete the assets available for those purchases, the court found that evidence sufficient to establish the required effect on interstate commerce. *Id.* at 12-14. Contrary to petitioners' suggestion (Pet. 5), the court of appeals did not hold that a single purchase at some unidentified time within a 20-year period is sufficient under the depletion-of-assets theory to establish the interstate-commerce element. Rather, the court emphasized that the depletion-of-assets theory requires that "the *victim-enterprise* must *customarily purchase* goods in interstate commerce." Pet. App. 13.

Indeed, the court of appeals specifically observed that evidence of a single out-of-state purchase "would not amount to the *customary purchase* of interstate goods, as required." Pet. App. 13. The court further cautioned that, "if Leach simply used gasoline, paint, and tools he had purchased for his personal consumption, then no *victim-enterprise* (i.e., warehouse) funds would have been used to purchase those interstate goods, as required." *Ibid.* Under either of those scenarios, the court of appeals concluded, the jury "would have been precluded from finding that the interstate commerce requirement of the Hobbs Act was met." *Ibid.* There is consequently no basis for petitioners' contention that the court of appeals in this case endorsed an unusually broad conception of the depletion-of-assets theory.

ii. Petitioners contend (Pet. 6) that the court of appeals erred in crediting "the victim's conclusory and imprecise testimony" that he used out-of-state gas, paint, and tools to maintain the warehouse. Nothing in this Court's decisions suggests, however, that any heightened proof requirement applies when the government seeks to demonstrate, for purposes of establishing the jurisdictional element of a federal statute, that particular interstate transactions have in fact occurred. To the extent that petitioners argue that the proof here was insufficient under ordinary evidentiary standards, that claim raises a fact-bound question that does not warrant this Court's review. In any event, as the court of appeals correctly held, Leach's uncontested testimony was sufficient to allow a reasonable jury to find that supplies

used to maintain the warehouse traveled in interstate commerce. See Pet. App. 13 & n.4.[1]

iii. Even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle for resolving it. As the government's brief in the court of appeals explained (at 13-15), petitioners failed to raise this claim in the district court, and it is therefore reviewable only for plain error.[2] Petitioners cannot establish that the evidence of effects on interstate commerce was so deficient that the district court plainly erred in submitting the case to the jury.

2. Petitioners contend (Pet. 6-8) that the court of appeals erred, and created a conflict with the Third Circuit, in holding that a district court should not consider post-sentencing conduct when determining, in a limited remand, whether it would have imposed a lower sentence under advisory Guidelines. The decision below was correct, does not conflict with any decision of the Third Circuit, and does not warrant further review.

a. In *Paladino*, the Seventh Circuit identified the standards and procedure to be used within the circuit in resolving plain-error claims under *Booker*. See *Paladino*, 401 F.3d at 481-485. With regard to the "substantial-rights" prong of plain-error review, the court explained that the record usually will not reveal whether *Booker* error materially affected a defendant's sentence. See *id.* at 482. Rather, the court held, "[t]he only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to de-

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[1] Petitioner Calabrese's interstate travel to commit the assault on Leach constitutes a further link between petitioners' offenses and interstate commerce. See Pet. App. 14.

[2] The court of appeals did not address the government's argument that the claim was subject to plain error review. See Pet. App. 11-12.

termine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge." *Id.* at 483. To that end, the Seventh Circuit in such cases will retain jurisdiction and will order a limited remand so that the district court can determine whether it "would have imposed a different sentence had [it] known the guidelines were merely advisory." *Id.* at 484. If the district court determines that it would have imposed the same sentence under advisory Guidelines, there has been no prejudice and the court of appeals will affirm the sentence, unless it is "unreasonable." Alternatively, if the district court determines that it would have imposed a different sentence under advisory Guidelines, then the court of appeals will find that there has been reversible plain error, vacate the sentence, and remand for resentencing. *Ibid.*

b. In light of the purpose of the limited-remand procedure adopted in *Paladino* and applied in this case, the court of appeals correctly held that petitioners' post-sentencing conduct should not be considered. As the court explained, the purpose of the limited remand is to determine whether the district court would have imposed a different sentence if it had understood the Guidelines to be advisory. Pet. App. 20-21. Because that inquiry looks to what the district court would have done at the time of the original sentencing, "[p]ost-sentencing events or conduct simply are not relevant." *Id.* at 21.

c. Contrary to petitioners' contention (Pet. 8), the decision below does not conflict with any decision of the Third Circuit. Petitioners cite no case, and we are aware of none, in which the Third Circuit has held that district courts may (or may not) consider post-sentencing conduct in resentencing defendants on remand in

Booker plain-error cases. In *United States* v. *Miller*, 417 F.3d 358, 363 (3d Cir. 2005), the court noted that on such a remand, "the District Court is free to use its ordinary discretion in handling the various procedural issues (such as the admission of additional evidence) that may arise." The "additional evidence" at issue in *Miller*, however, did not concern post-sentencing developments; rather, the quoted passage refers to the district court's refusal to consider additional evidence about the scope of one defendant's involvement in the conspiracy. *Id.* at 360.[3]

d. In any event, petitioners' claim involves a transitional issue that will likely have little continuing importance. This Court has repeatedly denied review of questions concerning the proper standards for evaluating

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[3] The post-*Booker* remand procedures devised by the Third and Seventh Circuits differ in scope and purpose. Under the Seventh Circuit's limited-remand procedure, the district court is asked to decide whether it would have imposed a different sentence if it had understood the Guidelines to be advisory. Based on the district court's response to that inquiry, the court of appeals determines whether reversible plain error has occurred. Only if the court of appeals finds after the limited remand that the defendant was prejudiced by the district court's prior treatment of the Guidelines as mandatory, or that the sentence imposed is unreasonable, does the Seventh Circuit vacate the original sentence and remand for resentencing. See *Paladino*, 401 F.3d at 483-484. The Third Circuit, by contrast, does not order limited remands, but instead presumes prejudice and automatically remands for resentencing. See, *e.g.*, *United States* v. *Davis*, 407 F.3d 162, 164-166 (3d Cir. 2005) (en banc); *United States* v. *Miller*, 417 F.3d 358, 362-363 (3d Cir. 2005). Even if the Third Circuit were to hold in the future that the district court in a resentencing procedure should consider all information available at the time of the resentencing (including information concerning events that postdated imposition of the original sentence), it would not logically follow that a district court within the Seventh Circuit should adopt the same approach in a *Paladino* limited remand.

Booker plain-error claims. See, *e.g.*, *Mares* v. *United States*, 126 S. Ct. 43 (2005); *Rodriguez* v. *United States*, 125 S. Ct. 2935 (2005). There is no reason for a different result in this case, which presents the much narrower and less significant question of what body of evidence should be considered in a *Paladino* limited remand.

3. Petitioners contend (Pet. 8-12) that the petition should be held pending this Court's decision in *Washington* v. *Recuenco*, cert. granted, 126 S. Ct. 478 (2005) (No. 05-83). Although petitioners' argument is not entirely clear, they frame the question presented (Pet. i) as "[w]hether enhancing a sentence on the basis of a judge-found fact in violation of the Sixth Amendment is structural error and thus not subject to harmless-error review." Petitioners' claim is without merit, and there is no reason to hold the petition pending the disposition of *Recuenco*.

a. Petitioners did not argue in the court of appeals that a Sixth Amendment violation under *Booker* is structural error. This Court generally does not consider questions that were neither pressed nor passed upon below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason for the Court to depart from that practice in this case.

b. Petitioners' claim appears to be premised on the contention (Pet. 8-10) that the remedial opinion in *Booker*, see 543 U.S. at 245-268, is inconsistent with the decision in *Blakely* because *Booker* permits courts to impose sentences under advisory Guidelines that exceed the maximum sentences that could have been imposed under mandatory Guidelines based solely on facts found by the jury or admitted by the defendant. Petitioners

contend (Pet. 10-12) that the Court's decision in *Recuenco* may bear on that question.

Petitioners' claim lacks merit. The remedial decision in *Booker* is not inconsistent with the decision in *Blakely*. As the Court made clear in *Booker*, it was the mandatory nature of the Guidelines that created the Sixth Amendment violation. See *Booker*, 543 U.S. at 233 ("[E]veryone agrees that the constitutional issues presented * * * would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges."). The remedial opinion addressed the distinct question whether the statutory provisions that make the Guidelines mandatory could properly be severed, thereby eliminating the Sixth Amendment violation. A majority of the Court concluded that they could, see, *e.g.*, *id.* at 244-246, and petitioners identify no reason for this Court to reconsider that determination. And because the question presented in *Recuenco*—*i.e.*, whether a Sixth Amendment violation under Washington's mandatory system is structural error—has no bearing on whether the Court's severance analysis in *Booker* was correct, there is no reason for this Court to hold the petition pending the disposition of *Recuenco*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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